NO. 16148

United States
COURT OF APPEALS
for the Ninth Circuit

HAMISH SCOTT MacKAY,

Appellant,

v.

EUGENE D. McALEXANDER, Acting District Director, District 31, Immigration and Naturalization Service,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon.

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REPLY IN SUPPORT OF APPELLANT'S STATEMENT OF THE ISSUES

Appellee contends that the issue of whether there was substantial, probative and reasonable evidence to support the order of deportation should not be reviewed in the light of the new standards set by the United States Supreme Court in *Rowoldt v. Perfetto,* 355 U.S. 115.

Appellee also contends that the constitutionality of the act was fully adjudicated in appellant's earlier appeal, *McKay v. Boyd,* 218 F.2d 666, cert. den. 350 U.S. 840, reh. den. 351 U.S. 929.

Appellant has set forth in his opening brief precisely why the issues as stated therein are the correct ones in this case and these points will be elaborated in the course of this reply brief.

REPLY IN SUPPORT OF APPELLANT'S PROPOSITION NO. I

Appellee brushes off the argument set forth on pages 6 through 11 of the appellant's opening brief to the effect that the statute under which the government seeks to deport appellant is unconstitutional as a bill of attainder. Appellee contends that the Supreme Court by implication decided this issue to the contrary in *Galvan v. Press,* 347 U.S. 522, and *Harisiades v. Shaughnessy,* 342 U.S. 580.

It is true, however, that in neither of these cases, nor in any subsequent United States Supreme Court case, was the issue decided as to whether Title 8, U.S. Code, Sec. 1251(a)(6)(c), is a bill of attainder. Judge Solomon's memorandum opinion to the contrary notwithstanding, there is nothing in the Court's decision in the Galvan case, nor in Mr. Justice Black's dissenting opinion in that case, that could lead anyone to the conclusion that the issue concerning a bill of attainder had been passed upon by the court.

The constitutional issues, we believe, should be considered because they raise important questions which affect the lives and liberties of the American people. It is significant that appellee in no way challenges the conclusions reached by appellant in his argument on this point. We are inclined to think that this constitutes an admission that the act in question is a bill of attainder and is therefore unconstitutional.

REPLY IN SUPPORT OF APPELLANT'S PROPOSITION NO. II

Appellee appears to base its argument that MacKay is a Canadian citizen upon two propositions of law: (1) That MacKay cannot "collaterally attack" the void citizenship certificate of his father, James MacKay; and (2) that the case of *Ex Parte Griffin,* 237 F. 445, held that one who takes an oath of allegiance to the King of Great Britain expatriates himself regardless of the treaty between the United States and Great Britain.

It should be pointed out that James MacKay's Canadian citizenship was void from the very start by reason of his sufficient residence in Canada and under the circumstances of this case, where the most serious penalty of deportation may be inflicted, appellant should be permitted to prove his American citizenship, even though it brings into question his father's alleged Canadian naturalization.

The government's citation of *Ex Parte Griffin,* supra, does not support its contention that the British-Ameri-

can treaty of May 13, 1870, 16 Stat. 775, does not bar the condition of statelessness which the government would seek to impose upon James MacKay by inference. The District Judge in the *Griffin* case did not discuss the effect of this British-American treaty. On the contrary, he imposed upon Griffin the very condition of statelessness which the treaty obviously seeks to eliminate. Although the treaty was in force at the time of the *Griffin* decision, it was apparently not called to the attention of the court and therefore the court never passed upon it.

The conclusion is inevitable then that in the light of this British-American treaty appellant's father retained his American citizenship until he was validly naturalized as a Canadian. This was not accomplished because of his insufficient residence in Canada. Thus, under the terms of the treaty, he remained an American citizen and transmitted this citizenship to the appellant, Hamish Scott MacKay.

For this reason appellant contends he is a citizen of the United States and is not subject to deportation.

REPLY IN SUPPORT OF APPELLANT'S PROPOSITION NO. III

Appellee in its answering brief (pp. 17, 18) seems to have missed entirely the point raised by appellant in his opening brief, namely that appellant was not afforded a fair hearing on his application for suspension of deportation because the special inquiry officer presid-

ing at this hearing was the same person who had served as hearing officer in the initial hearings on appellant's deportability and who had ordered appellant deported.

Appellee seeks to argue that the presiding officer at the suspension hearing had ample grounds on which to deny suspension to appellant. But this is not the point. The point is that the said hearing officer was biased and that the denial of appellant's right to a hearing presided over by a fair and impartial officer invalidated the hearing and denied appellant due process of law.

REPLY IN SUPPORT OF APPELLANT'S PROPOSITION NO. IV

Appellee in effect accuses appellant of a misstatement of facts on pages 18 and 19 of its brief. In so doing, appellee apparently inadvertently failed to read the quotation from the decision of the special inquiry officer on page 19 of appellant's opening brief which speaks for itself as to what the hearing officer meant.

All quibbles aside, there is no debate that appellant has established his statutory eligibility for the exercise of the discretionary relief of suspension of deportation. The issue in this case is whether or not the government's denial of suspension of deportation was an abuse of discretion. We are astounded to learn from appellee's answering brief that in such a hearing as this "his activities, the organizations to which he belonged or the principles with which he was in sympathy and the individuals with whom he maintained an association, were all open to inquiry." (Br. 21)

Under such a doctrine as urged by appellee, there are apparently no constitutional limits upon the scope of the inquiry to which an applicant for suspension of deportation may be subjected. Matters of relevancy and materiality to the issue of whether or not he would be a desirable resident in this country may apparently be ignored by the government.

Moreover, the government would have us believe that any question, any line of inquiry, or any investigation, is perfectly legitimate even if it is not established by the government to have a bearing upon the desirability of the alien as a resident. If the alien refuses for good and valid reasons to participate in what might be termed a "witch hunt", under the government's theory he should automatically be denied suspension of deportation even if the government has failed to establish or explain in any way what connection the question has with the issues to be determined in the hearing on the application for suspension of deportation.

We sincerely hope that the American concept of due process of law has not shrunk to such an impotent and insignificant barrier to manifest unfairness.

REPLY IN SUPPORT OF APPELLANT'S PROPOSITION NO. V

The government contends in its answering brief that *Rowoldt v. Perfetto, supra,* did not change in any way the test laid down in *Galvan v. Press, supra,* as to the sufficiency of evidence of "meaningful association" as a basis for deportation.

This proposition presented to this Court by the government is apparently, however, not the same interpretation of the *Rowoldt* case that the government has made in connection with its review of many deportation cases. The government cannot deny that since the Supreme Court's decision in the *Rowoldt* case, the Board of Immigration Appeals has reviewed a number of deportation cases to determine if aliens previously found deportable were in fact deportable under the standards as redefined in *Rowoldt.* Surely the language of the Court in requiring that a deportation order be supported by "substantial" proof that an alien had a "meaningful association" not wholly void of "political implications," as well as the facts of *Rowoldt,* added new elements to the framework erected by *Galvan v. Press, supra.*

In view of the extremely weak case presented by the government, and the demonstrated unreliability of the government's witnesses (Appellant's Opening Brief pp. 24-27) we think it is only fair that this Court take another look at the record to determine if, in the light of *Rowoldt v. Perfetto, supra,* there is the kind of evi-

dence required by the statute to support the order of deportability. It should be emphasized again that Section 1252(b)(4) of Title 8, U.S. Code, requires that "No decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." Clearly the evidence must not only be substantial and probative, but also reasonable. We respectfully refer the Court to the analysis of the evidence made in the opening brief with the suggestion that it does not measure up to the requirements of the statute as interpreted by *Rowoldt*.

CONCLUSION

Appellant respectfully urges that the judgment be reversed with instructions to grant the relief prayed for in appellant's Amended Petition for Writ of Habeas Corpus and Injunctive Relief to Prevent Agency Action.

Respectfully submitted,

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